



United States
General Accounting Office
Washington, D.C. 20548

158182

General Government Division

B-275361

February 19, 1997

The Honorable Alfonse M. D'Amato
Chairman, Committee on Banking,
Housing, and Urban Affairs
United States Senate

Dear Mr. Chairman:

This letter responds to your September 4, 1996, request for additional information on the Export-Import Bank's (Ex-Im Bank) noncompliance with statutory and regulatory requirements in awarding retention allowances to its employees. You cited recent reports by us and the Office of Personnel Management (OPM) on the issue and asked 12 series of questions regarding actions taken by Ex-Im Bank officials in response to our¹ and OPM's² audit findings and recommendations.

In general, you asked us to determine the number and dollar value of illegally awarded allowances, what actions the Chief Operating Officer (COO) took in response to our and OPM's concerns, the roles of the Office of Management and Budget (OMB) and the National Performance Review (NPR) in advising and approving the Ex-Im Bank's actions, and the status of the Ex-Im Bank's current retention allowance program. Our answers are summarized below, and detailed responses to each series of questions are presented in enclosure I.

You were also interested in the extent of employee turnover at the Ex-Im Bank and how the Bank's turnover rates compared with those of similar agencies. As agreed with your office, we will address these issues in a later product.

¹Retention Allowances: Usage and Compliance Vary Among Federal Agencies (GAO/GGD-96-32, Dec. 11, 1995).

²Use of Retention Allowances and Recruitment Bonuses at the Export-Import Bank of the United States, Merit Systems Oversight Review, January 19, 1996.

RESULTS IN BRIEF

During our and OPM's reviews of the Ex-Im Bank's retention allowance program, 217 employees were receiving retention allowances. OPM determined that these 217 allowances, as well as those received by 6 other employees prior to OPM's review, were not approved in accordance with applicable law and regulations. From the program's inception in fiscal year 1992 until the termination of the existing allowances effective January 21, 1996, 223 employees received retention allowances totaling \$1,305,514. In a legal decision, we granted the Ex-Im Bank's request for waivers of repayment for the 223 employees. In granting the waivers, we determined that the employees received the allowances in good faith and with no knowledge that they were erroneous. Thus, collection of the erroneous overpayments would be against equity and not in the best interest of the United States. (See enclosure II.)

We conveyed our preliminary compliance concerns to Ex-Im Bank officials on April 4, 1995. However, on the basis of previous questions we had raised about the Ex-Im Bank's policy and practices, Bank staff had already informed the COO on March 30, 1995, that we had compliance concerns. The Ex-Im Bank received OPM's draft report identifying its serious concerns on October 31, 1995, and received OPM's conclusion that the Ex-Im Bank's use of retention allowance authority was illegal in its January 19, 1996, final report. The COO began taking actions to respond to OPM's concerns following a meeting with OPM on November 30, 1995. Actions taken from then until September 19, 1996, included relieving the Bank's Vice President for Management Services and Human Resources of personnel responsibilities, suspending all retention allowances, hiring the National Academy of Public Administration (NAPA) to review the Bank's retention allowance justifications for compliance with regulations and to identify ways in which the program could be improved, hiring a Counsel for Administration to provide senior management with legal advice on human resource issues, and modifying its retention allowance plan to comply with federal law and regulations.

While Ex-Im Bank officials discussed the Bank's plan for streamlining its workforce and several of its pay-for-performance strategies with OMB, both OMB and Ex-Im Bank officials agreed that the Bank's streamlining plan did not discuss specific strategies for rewarding performance or retaining highly skilled staff. They also agreed that OMB officials had not officially approved any of the Bank's pay-for-performance strategies, including the use of retention allowances. Also, the Ex-Im Bank's Chief Financial Officer told us that Ex-Im Bank officials have no recollection of substantive discussions with NPR concerning the streamlining plan or pay-for-performance strategies, such as retention allowances, and they acknowledged that NPR did not approve any of these initiatives.

OPM officials said the Ex-Im Bank's current retention allowance program is in compliance with applicable laws and regulations. In this regard, OPM reviewed and approved the awards for the eight Ex-Im Bank employees who received retention

allowances after January 21, 1996, and the Bank incorporated OPM's suggestions in its September 19, 1996, revision to its retention allowance plan. Our review of the Ex-Im Bank's current retention allowance plan indicated that it resolves the deficiencies we identified in the previous administration of the program.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this letter is to provide information on the Ex-Im Bank's retention allowance program. We were asked to provide answers to 12 series of questions concerning the Ex-Im Bank's failure to comply with federal laws and regulations in awarding retention allowances, the corrective actions taken by the Bank to address deficiencies in awarding allowances, and the current status of the Bank's retention allowance program.

To accomplish our objective, we interviewed, and obtained various policy documents and statistical information from, officials of the Ex-Im Bank, OPM, NAPA, OMB, and NPR. To determine when the COO became aware of our and OPM's concerns, the actions taken by the Ex-Im Bank in response to those concerns, and the reasons for those actions, we queried Ex-Im Bank officials and reviewed Bank documents, such as internal memorandums and the retention allowance plan. To validate statements made by Ex-Im Bank officials concerning input and approvals received from OPM, NAPA, OMB, and NPR, we interviewed officials from these agencies who had met with Ex-Im Bank officials and reviewed reports, retention allowance plan comments, and other documents these agencies had developed during their reviews of the Ex-Im Bank and interactions with Ex-Im Bank officials.

To determine the numbers and amounts of the Ex-Im Bank's retention allowances, we obtained from the Bank the employees' names and award amounts for all retention allowances awarded for fiscal years 1992 through 1996. To verify the number and amounts of current awards provided by the Bank, we obtained an extract from OPM's Centralized Personnel Data File that identified Ex-Im Bank employees who were receiving retention allowances between January 21, 1996, and September 30, 1996, and compared the employees' names and award amounts with those provided by the Ex-Im Bank. As agreed, we did not review the justifications for these awards since we determined they all had been reviewed and approved by OPM and we found no discrepancies between the Ex-Im Bank and OPM data.

We did our work in Washington, D.C., from October through December 1996. Our work was done in accordance with generally accepted government auditing standards. We provided a draft of this letter to the President of Ex-Im Bank, the Directors of OPM and OMB, and the President of NAPA for their review and comment.

AGENCY COMMENTS

Ex-Im Bank, OPM, and NAPA provided comments on a draft of this letter. We received oral comments from the Chief Financial Officer, General Counsel, and Director of Personnel, Ex-Im Bank, on January 29, 1997; the Deputy Chief of Staff, OPM, on January 28, 1997; and the Project Director, NAPA, on February 4, 1997. The three agencies agreed that the information presented in the letter is accurate. The Ex-Im Bank also provided technical comments, which we incorporated where appropriate. The Director of OMB did not provide comments.

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We are sending copies of this letter to the Ranking Minority Member of the Senate Committee on Banking, Housing, and Urban Affairs; the Chairman, Ex-Im Bank; the Directors of OPM, OMB, and NPR; and the President of NAPA. We will also make copies available to others who may have an interest in these matters.

Major contributors to this letter were Larry Endy, Tom Davies, and Jeff Dawson. We trust that this information satisfactorily responds to your request. If you have questions concerning this letter, please contact me at (202) 512-8676.

Sincerely yours,



L. Nye Stevens
Director
Federal Management
and Workforce Issues

Enclosures - 2

**RESPONSES TO COMMITTEE QUESTIONS ON
EX-IM BANK'S USE OF RETENTION ALLOWANCES**

1. During GAO's review, the Ex-Im Bank reported 100 employees were receiving retention allowances, while during OPM's review the Bank reported over 200 employees were receiving allowances. When did the additional employees begin receiving "illegal" retention allowances, and who made this decision? How many additional allowances were awarded during the reviews? At what point did the Ex-Im Bank stop adding new employees to receive the illegal allowances?

We reviewed Ex-Im Bank's retention allowance program from November 1994 to December 1995, and our review was limited to data on the 100 allowances awarded during fiscal year 1994. OPM reviewed the program from July 1995 to January 1996, during which period 217 allowances were in effect. We first raised questions about the Ex-Im Bank's criteria for awarding allowances in March 1995, and we expressed our preliminary compliance concerns in a meeting with the Bank's Vice President for Management Services and Human Resources and a senior personnel specialist on April 4, 1995. Effective April 30, 1995, the Bank made first-time allowance awards to 116 employees and renewed or continued to pay allowances to 99 employees. In August and September 1995, the Bank decided to make 2 first-time awards and renew 10 existing allowances. The Bank approved the last allowance on September 3, 1995. OPM reported on January 19, 1996, that the current and past allowances were not paid in accordance with law and regulations.

Four levels of Ex-Im Bank supervisors and managers were involved in nominating, reviewing, and approving the allowances awarded on April 30, 1995. Initial recommendations were made by the employees' immediate supervisors. These recommended awards were forwarded to second level supervisors for review and approval. A list of nominated employees resulting from the second level review was then compiled and reviewed by the Director of Personnel and the Vice President for Management Services and Human Resources. A final list of recommended awardees was then presented to the COO, who made the final decisions.

The process supervisors and managers used to evaluate whether an employee was qualified for an allowance emphasized the employee's "current and expected levels of performance" as the key criterion in determining whether an employee should receive a retention allowance, although this is not stated as a criterion in the statute and regulations. The retention allowance plan did include the requirement that an allowance could not be paid unless a determination was made that an employee was likely to leave the federal government absent an allowance. However, the likelihood of leaving was incorrectly equated with an employee's high level of performance. According to the Director of Personnel, she, under the supervision of the Vice

President for Management Services and Human Resources, was the official responsible for developing the retention allowance plan used during fiscal years 1994 and 1995. She said that OPM's guidance at that time did not indicate that it was inappropriate to use a high level of performance as a criterion for determining whether an employee was likely to leave, and that therefore she and other Ex-Im Bank officials did not believe the criterion was inconsistent with OPM's regulations.

2. When did OPM initiate its review of the Ex-Im Bank's retention allowance program? When and how did OPM initially notify the Ex-Im Bank that there were problems with its application of the retention allowance authority? When did the Ex-Im Bank receive OPM's conclusions?

In June 1995, we met with OPM officials to discuss our concerns about the Bank's retention allowance program. After these discussions, and in furtherance of its oversight responsibility, OPM notified the Bank in a July 21, 1995, letter that it was initiating a review of the Bank's retention allowance program and other pay matters. In its letter, OPM noted that we had raised questions about the Bank's use of retention allowances and that the Bank had approved allowances to an extent that appeared out of proportion to its size, as well as for employees whose occupations and grade levels made retention allowances appear to be inappropriate.

On October 31, 1995, OPM provided its draft audit report on the retention allowance program to the Ex-Im Bank. The draft report stated that OPM had serious concerns about the appropriateness of the Bank's use of its retention allowance authority. Both Ex-Im Bank and OPM officials agree that this was the first time OPM's concerns were conveyed to the Bank. The Ex-Im Bank officially received OPM's conclusion that the allowance payments were not being made in accordance with law and regulations, and that OPM was suspending the Bank's delegated authority to grant or recertify allowances, when OPM transmitted its January 19, 1996, report.

3. What official did the Bank hold accountable for the mismanagement of the retention allowance program? What steps did the COO take to ensure the new retention allowance program complied with laws? What actions were taken internally to correct management problems related to the retention allowance issue?

The Bank's Vice President for Management Services and Human Resources was held accountable. She was relieved of her personnel responsibilities and reassigned by the COO to a nonpersonnel-related position immediately following a November 30, 1995, meeting of Ex-Im Bank and OPM officials to discuss OPM's draft report. According to Ex-Im Bank and OPM officials, this decision was made by the Bank's COO.

The COO also proposed during the meeting that the Bank (1) recruit an outside expert for the purpose of reviewing the Bank's retention allowance justifications for

compliance with regulations, as well as to identify ways in which the program could be improved, and (2) modify its retention allowance procedures to comply with federal regulations.

The Ex-Im Bank took several steps to eliminate previous problems and to attempt to make its program comply with federal regulations. On February 7, 1996, it notified the current 200 recipients of retention allowances that the allowances would be terminated as of January 21, 1996.³ In February, the Ex-Im Bank also contracted with NAPA, as an independent organization with human resource expertise, to review the Bank's retention allowance program and procedures for compliance with federal law, regulation, and guidance. Using those sources, NAPA developed criteria to use in determining whether the documentation submitted for an individual employee would meet the requirements for receiving a retention allowance. Using the criteria, the Ex-Im Bank's supervisors reevaluated the documentation for their employees' allowances and submitted revised supporting documentation for those employees who appeared to meet the criteria. NAPA, based on its review of supporting documentation and interviews with supervisors, recommended to the Ex-Im Bank that 3 of the suspended allowances met the criteria and that 12 other suspended allowances could possibly meet the criteria with some additional support. The Ex-Im Bank ultimately submitted justifications for 8 of these 15 employees to OPM for review and approval.

NAPA and OPM also provided recommendations for revising the Ex-Im Bank's retention allowance plan to comply with applicable regulations. The Ex-Im Bank revised its plan to address these recommendations. The Ex-Im Bank also hired a Counsel for Administration on July 30, 1996, to provide senior management with legal advice on human resource issues, including personnel regulations.

4. When was the COO first apprised of GAO's inquiry into the use of retention allowances? When did the COO first learn of GAO's concerns about the Bank's policies for using retention allowances? What internal actions did this official take, including whether he suspended the use of retention allowances when first apprised of the problem?

The COO was initially notified of our review of the Ex-Im Bank's retention allowance program on November 30, 1994. The COO's first documented notification of our concerns with the Bank's program policies and practices was an internal memorandum from a senior personnel specialist on March 30, 1995, shortly after we raised questions based on our limited review of employees' allowance justifications. Ex-Im Bank officials could not remember whether the COO had been informed of our concerns at

³From February 6, 1995, through January 21, 1996, 17 employees' retention allowances were terminated. Of these, 10 resulted from employees resigning from the Ex-Im Bank, and in the other 7 cases, employees' allowances were terminated.

an earlier date. The specialist, based on our questions, indicated that we were concerned about the Bank's practice of using high performance as a criterion for awarding retention allowances. In the memorandum, the specialist said that "law and regulations allow agencies to use retention allowances 'only' when there is a real threat that an employee will leave the government." In his written response to the specialist the next day, the COO requested that the specialist disclose completely to us the Bank's policy and strategy for using retention allowances. In our April 4, 1995, meeting in which we expressed our preliminary compliance concerns, the specialist and the Vice President for Management Services and Human Resources thoroughly explained the Ex-Im Bank's policy and strategy and why they believed the Bank's actions were appropriate. They said that the retention allowance program was an integral part of the implementation of the Ex-Im Bank's streamlining plan to restructure both its workforce and its performance management strategy.

The COO did not consider it necessary to terminate the retention allowances until he received and considered OPM's January 19, 1996, report indicating that the retention allowance payments were inappropriate and did not comply with federal requirements. The report provided a 60-day review period to determine whether individual retention allowances should be continued. The report was accompanied by a cover letter, however, that stated that the allowances were illegal. The Ex-Im Bank's Chief Financial Officer questioned whether OPM had in fact made a finding of illegality, in which case certifying the Bank's payroll, including retention allowance payments, would be inappropriate. Ex-Im Bank officials asked OPM to clarify its position, and on February 6, 1996, OPM's General Counsel, in a letter to the Ex-Im Bank, stated that the Bank's use of retention allowances was illegal. Based on this response and the Chief Financial Officer's concern, the Ex-Im Bank terminated payment of existing allowances on February 7, 1996, effective January 21, 1996.

5. What did the COO do to correct procedural shortcuts in documentation and the reasoning behind those decisions between September 1995 and the time GAO's and OPM's reports were released? When did the Ex-Im Bank stop making additional retention allowance awards? Did the Ex-Im Bank's actions comply with the law and OPM regulations?

After receiving OPM's draft report on October 31, 1995, the COO directed the Acting General Counsel to review the drafts of our and OPM's reports, the relevant laws and regulations, and the process by which awards had been made, and to prepare an analysis of the propriety of the Bank's use of the retention allowance authority. The staff attorney assigned to the analysis concluded that the Bank's use of the retention allowance authority exceeded the apparent intent of the statute and that the Bank's documentation of awards generally did not meet the statutory and regulatory requirements. The COO took several corrective actions on the basis of the staff attorney's response and the November 30, 1995, meeting with OPM. (See response to question number 3.) However, none of the actions taken prior to issuance of OPM's

report on January 19, 1996, addressed procedural shortcuts. Ex-Im Bank officials said that no actions were taken with regard to documentation or other procedures because the Bank did not approve any retention allowances from September 1995 until March 31, 1996.

6. The COO sent a letter to GAO representing that the Ex-Im Bank had worked on a pay-for-performance strategy with OMB and NPR to execute the Bank's streamlining plan. Identify by name and position the officials from OMB, NPR, and the Ex-Im Bank who were involved in discussions regarding the Bank's pay-for-performance strategy to execute its "streamlining plan." Who from OMB and NPR approved the plan? Did OMB or NPR specifically and officially approve the Ex-Im Bank's use of retention allowances?

At various times during fiscal years 1993 and 1994, OMB representatives Rodney Bent, Economic Affairs Branch Chief, and Michael Casella, Examiner, had discussions about the Bank's streamlining plan and pay flexibility matters with Ex-Im Bank representatives Martin Kamarck, COO; Tamzen Reitan, Vice President for Management Services and Human Resources; and James Hess, Chief Financial Officer.

Mr. Casella told us that OMB reviewed and commented on agencies' streamlining plans but never officially approved them. He said OMB reviewed the Ex-Im Bank's streamlining plan for conformity with OMB guidelines as part of its responsibility for overseeing executive branch agencies' efforts to meet the NPR goals to achieve specific reductions in targeted positions, as well as to ensure that agencies' workforces corresponded to anticipated budgetary resources. According to Mr. Casella, discussions about the Ex-Im Bank's plan did not address specific remedies for retaining employees, such as retention allowances. He noted, in fact, that OMB did not agree that the Bank had retention problems. We reviewed the Ex-Im Bank's streamlining plan and found that it did not address retention allowances.

According to Mr. Casella, Ex-Im Bank sought OMB's support for statutory authority to "administratively determine" pay for many of its positions, as well as to solicit OPM's approval to initiate a pay demonstration project. He said that, while OMB was generally supportive of the Ex-Im Bank's effort to work with OPM to initiate a pay demonstration project, OMB did not concur with the Ex-Im Bank's need for additional statutory pay authority. He also said that, although he did not recall specific discussions about the Ex-Im Bank's use of retention allowances, OMB would not have endorsed the manner in which the Bank exercised its retention allowance authority.

John Kamensky, Deputy Director, NPR, told us that the NPR staff member who had been responsible for dealing with Ex-Im Bank affairs during fiscal years 1993 and 1994 had left the federal government. We contacted the ex-staffer's former federal agency and telephone directory assistance where he was thought to have relocated, but we were unable to locate the individual. The Deputy Director said that the agencies'

streamlining plans were principally a workforce restructuring initiative that would not have involved an agency's pay-for-performance management strategy or retention allowance program. He also said that NPR does not approve streamlining plans.

In responding to us on this series of questions, the Bank acknowledged that the streamlining plan does not discuss specific strategies for rewarding performance or retaining highly skilled staff, and that OMB officials had not officially approved the streamlining plan or pay-for-performance strategies, such as retention allowances. In responding to the questions, the Chief Financial Officer told us that Bank officials have no recollection of substantive discussions with NPR regarding the streamlining plan, pay-for-performance strategies, or any NPR approval of these initiatives.

7. How many of Ex-Im Bank's suspended awardees did NAPA recommend be submitted to OPM to continue to receive a retention allowance, and how many employees are currently receiving retention allowances?

NAPA, on the basis of its review of supporting documentation and interviews with supervisors, concluded that 3 of the suspended allowances met the criteria for receiving retention allowances, and that 12 other suspended allowances could possibly meet the criteria with some additional support. Ex-Im Bank officials reviewed NAPA's input and on March 4, 1996, submitted to OPM justifications for 8 of these 15 employees, as well as for 2 other employees Ex-Im Bank officials believed met the approval criteria. After discussions with OPM officials, Ex-Im Bank withdrew two of the nominations, and OPM then approved retention allowances for the remaining eight employees—two of which allowances were effective on March 31, 1996, and six on April 14, 1996. Of the eight employees, seven were receiving retention allowances as of September 30, 1996, and one had left the Ex-Im Bank. No other Ex-Im Bank employees were receiving retention allowances at that time.

8. Is Ex-Im Bank's current retention allowance program in compliance with the law? Does the Bank have an acceptable retention allowance plan?

We and OPM believe that the Ex-Im Bank's current retention allowance program, including its retention allowance plan, is in compliance with applicable statutory and regulatory requirements. OPM officials, who had previously been involved in the review of Ex-Im Bank and in discussions with Bank officials regarding the use of various pay authorities, said that the Ex-Im Bank's current retention allowance program is in compliance with applicable law and regulations. OPM officials based this conclusion on the fact that OPM reviewed and approved the awards for all seven of the Ex-Im Bank employees currently receiving retention allowances and for the one

employee who has since left the Bank.⁴ The OPM officials said that OPM reinstated the Ex-Im Bank's retention allowance authority on April 12, 1996, based on its belief that the Bank was prepared to administer its retention allowance authority appropriately. As agreed with the Committee staff, we did not independently evaluate retention allowances that had already been reviewed and approved by OPM.

The Ex-Im Bank's Retention Allowance Plan, dated September 19, 1996, responds to recommendations made by us, OPM, and NAPA, and complies with federal law and regulations. In our previous report on governmentwide implementation of the retention allowance program, we recommended that the Ex-Im Bank revise its retention allowance plan to include the required criteria for determining the value of retention allowances. The Bank's current plan contains five criteria for determining the amount of an allowance, including one which specifies that the supervisor may consider the amount necessary to match a nonfederal salary offer. OPM officials also stated that the Ex-Im Bank's plan adequately addressed suggestions made by OPM in August 1996.

Previously, the Ex-Im Bank had contracted with NAPA on February 1, 1996, to perform an independent assessment of the validity of the Ex-Im Bank's retention allowances and to make recommendations to bring the Bank's retention allowance program into compliance with applicable law and regulations. In its report, Retention Allowances of the Export-Import Bank of the United States, dated March 1, 1996, NAPA identified remedial measures that would improve the program and possibly prevent recurrence of noncompliance issues. One recommended measure was that the Ex-Im Bank modify the provisions of its retention allowance plan to clarify that the requirements specified by law and regulation must be met.

9. Are there currently any highly unusual cases of retention allowance recipients, such as employees also receiving buyouts, and if so, are these cases consistent with applicable law?

OPM has reviewed and approved all of the current Ex-Im Bank retention allowances. In addition, we found no instances where any of the eight employees who were ultimately approved to receive retention allowances also received a buyout incentive.

10. How much did the Ex-Im Bank spend in total on retention allowances? How much was spent on retention allowances OPM later determined to be erroneous? Who determined whether illegal retention allowance funds should

⁴We compared the Ex-Im Bank's list of employees receiving retention allowances as of September 30, 1996, with a list of the Bank's retention allowance awardees provided by OPM for the same period, and did not find any discrepancies.

be paid back, and what is the status of this determination? Were there any conclusions of that determination?

During fiscal years 1992 through 1996, the Ex-Im Bank paid \$1,341,315 in retention allowances to 223 employees. The Ex-Im Bank requested repayment waivers from us for the \$1,305,514 in erroneous payments to the 223 employees prior to January 21, 1996. In addition, OPM approved the Bank's revised justifications for 8 of the 223 employees, and they received a total of \$35,801 between March 31, 1996, and September 30, 1996.

On June 28, 1996, the Ex-Im Bank submitted a written request to us for waiver of repayment for all 223 employees who had received retention allowances. We issued a decision on December 13, 1996, granting a repayment waiver to all 223 Ex-Im Bank employees who had erroneously received retention allowances during part or all of fiscal years 1992 through 1996 (see enclosure II). In granting the waivers, we determined that the employees received the allowances in good faith and with no knowledge that they were erroneous. Thus, we concluded that collection of the erroneous overpayments would be against equity and not in the best interests of the United States.

11. Detail whether or not the Bank had a problem retaining its top employees over the past 5 years. How many employees have left the Bank? How does this compare with the turnover rates of other similar agencies? Was the use of retention allowances successful in retaining employees? How many employees left the agency that were receiving retention allowances?

As agreed with the Committee staff, this analysis will be performed as a separate assignment.

12. Who is presently the COO of the Ex-Im Bank? Is this individual responsible for the human resource decisions and the pay-for-performance initiative? If the position is vacant, who is responsible for those functions and activities?

Ms. Julie Belaga is presently the Ex-Im Bank's COO and is responsible for the Bank's human resource decisions and its pay-for-performance initiative. Human resource decisions and the pay-for-performance initiative are the immediate responsibility of the Director of Personnel, who reports to the Executive Vice President, who reports to the COO.



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Export-Import Bank Employees—Waiver of Erroneous Retention Allowances and Recruitment Bonuses

File: B-272467

Date: December 13, 1996

DIGEST

Waiver is granted to Export-Import Bank employees who received erroneous payments in the form of retention allowances and recruitment bonuses from 1992 to 1996. Since the employees received the payments in good faith and without knowledge that they were erroneous, collection of the erroneous payments would be against equity and not in the best interest of the United States.

DECISION

This decision responds to a request from the General Counsel, Export-Import Bank (Ex-Im Bank), for waiver of erroneous payments under the provisions of 5 U.S.C. § 5584 (1994). The erroneous payments involved recruitment bonuses and retention allowances that were awarded to numerous Ex-Im Bank employees from January 12, 1992, to January 20, 1996.¹ For the reasons that follow, waiver is granted.

Background

The Federal Employees Pay Comparability Act of 1990, approved November 5, 1990, Pub. L. No. 101-509, 104 Stat. 1427, enacted into law two new pay provisions that gave the Office of Personnel Management (OPM) the authority to authorize the head of an agency to pay recruitment bonuses and retention allowances under regulations prescribed by OPM. Under 5 U.S.C. § 5753 (1994), an agency may pay a recruitment bonus to a newly appointed employee if it determines that in the absence of a bonus it is likely that the agency would have difficulty in filling the position. Under 5 U.S.C. § 5754 (1994), an agency may pay a retention allowance to an employee if (1) the employee's unusually high or unique qualifications, or a special need of the agency for the employee's services, makes it essential to retain the employee; and (2) the agency determines that the employee would be likely to leave in the absence of an allowance. Recruitment bonuses are paid in a lump sum,

¹The amount of the waiver for retention allowances is \$1,305,513.66, and for recruitment bonuses \$203,520.00, for a total of \$1,509,033.66.

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whereas retention allowance awards are paid at the same time and manner as the employee's basic pay.

OPM has promulgated regulations, set forth in 5 C.F.R. Part 575 (1996), to carry out the recruitment and retention allowance authorities. The regulations require agencies to prepare a recruitment bonus and retention allowance plan containing (1) criteria that must be met or considered in authorizing allowances, including criteria for determining the size of an allowance; (2) a designation of officials with authority to review and approve payment of recruitment bonuses and retention allowances; (3) procedures for paying allowances; and (4) documentation and recordkeeping requirements sufficient to allow reconstruction of the actions taken to award the allowances.

According to the Ex-Im Bank's report to our Office in support of its waiver request, the Bank adopted a retention allowance and recruitment bonus plan in 1991 and began using this authority on a limited basis in 1992. In 1993, Ex-Im Bank management decided to pursue a strategy of pay-for-performance meant to reward financially the Bank's highest performing employees. As part of this strategy, the Ex-Im Bank's senior management linked consideration of retention bonuses to its performance appraisal process, and in effect used retention bonuses as a form of pay-for-performance awards. The Bank's management reasoned that high performers were most at risk of being lured away to higher paying, private sector jobs.

At the end of the Ex-Im Bank's performance review cycle in 1993, 48 retention allowances were awarded to the highest performing employees at the GS-13 level and above. Subsequent performance review cycles resulted in an additional 52 employees receiving retention allowances in 1994, and 117 in 1995. A few additional retention allowance awards were made to individual employees at other times during 1994 and 1995. As of January 20, 1996, approximately 42 percent of the Ex-Im Bank's staff were current recipients of retention bonuses.

In response to a congressional request, the General Accounting Office initiated a review of the use of retention allowances by a number of federal agencies, including the Ex-Im Bank.² During meetings with Ex-Im Bank officials held in April and June of 1995, GAO staff members raised questions and expressed preliminary concerns about the Bank's extensive use of retention bonuses and its practice of linking such bonuses to performance appraisals. GAO also informed OPM of its preliminary compliance concerns. Subsequently, in furtherance of its oversight responsibility,

²Our review resulted in a report entitled Retention Allowances: Usage and Compliance Vary Among Federal Agencies, GAO/GGD-96-32 (December 1995).

OPM initiated an in-depth review of Ex-Im Bank's use of retention allowances and recruitment bonuses.

The last round of retention allowances were awarded at the conclusion of the Bank's 1995 performance appraisal cycle, and were effective on April 30, 1995. Payments attributable to current allowances continued as the GAO and OPM reviews proceeded. During the reviews, Ex-Im Bank management initially adhered to its view that the Bank's retention allowance practices complied with the law. On August 21, 1995, the Bank's Vice Chairman sent an e-mail message to all employees concerning the GAO and OPM reviews. His message concluded:

"I want to assure you that no decisions or recommendations have yet been made with regard to the Bank's retention allowance program. Certainly, we are confident that our program is within 'the letter of the law'."

On October 31, 1995, OPM provided the Ex-Im Bank with a draft report on its review of the Bank's use of retention allowances and recruitment bonuses. Among other things, the draft report expressed serious concerns about (1) the appropriateness of the process by which retention allowances were awarded (i.e., being linked to performance); (2) the large number of awards; (3) the appropriateness of the particular circumstances in which certain awards had been made (such as to retiring employees, to support staff, and to a student employee); and (4) the adequacy of the documentation supporting almost all of the awards.

Following a review of the OPM draft report, the Ex-Im Bank's counsel advised the Vice Chairman on November 30, of her conclusion--

"that the OPM draft report was substantially correct in its overall conclusion that the Bank's utilization of the retention allowance authority was, in an indeterminate number of cases, inappropriate and that documentation was, as a general matter, inadequate."

Later on that same day, November 30, the Vice Chairman met with the OPM official responsible for the draft report and agreed to take a number of remedial actions. These actions were to include having an outside expert review the Bank's retention allowance practices and revising the Bank's procedures to comply with applicable regulations. According to the Bank's report to our Office, OPM did not propose that ongoing payments be suspended or terminated.

On January 19, 1996, prior to completion of the Bank's remedial actions, OPM issued its final report.³ The final report described Ex-Im Bank recruitment and retention payments as "illegal," suspended the Ex-Im Bank's delegated authority to administer the retention and recruitment programs, and required the Ex-Im Bank to justify all existing retention allowances and recruitment bonuses. With respect to the last point, the OPM report stated:

"... The Bank will be required to justify all existing retention allowances and recruitment bonuses and have them approved by OPM within 60 days of receipt of this report, or take appropriate corrective action--i.e., termination of the actions and collection or waiver of overpayments."

On February 7, 1996, Ex-Im Bank notified its employees by e-mail that it was suspending retention allowance payments effective January 20, 1996. Subsequently, on February 14, the Ex-Im Bank determined that all of the retention allowances and all but two of the recruitment bonuses at issue were inadequately documented and therefore erroneous. At that time, the Ex-Im Bank also determined that it would be impractical if not impossible to re-document existing retention allowances and submit them to OPM for approval. An e-mail notice to Ex-Im Bank employees dated March 12, 1996, advised them that a request for waiver on behalf of the employees would be sent to GAO.

Analysis

Under the provisions of 5 U.S.C. § 5584 (1994), the Comptroller General may waive, in whole or in part, a claim arising out of an erroneous payment of pay to an employee if there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, and if collection of the payment would be against equity and good conscience and not in the best interests of the United States.⁴ Under the terms of the statute and our implementing regulations, 4 C.F.R. Part 92 (1996), the appropriateness of waiver turns on the knowledge and conduct of the employees who have received erroneous payments, rather than the actions of the agency in making such payments. The principal test is whether an employee knew

³Use of Retention Allowances & Recruitment Bonuses at the Export-Import Bank of the United States (January 1996).

⁴The General Accounting Office Act of 1996, approved October 19, 1996, Pub. L. No. 104-316, 110 Stat. 3826, transferred the Comptroller General's waiver authority under 5 U.S.C. § 5584 to the Director of the Office of Management and Budget, or the Director's delegatee, effective 60 days after the date of enactment of the Act. See Pub. L. No. 104-316, §§ 101(a)(3); 101(e), and 103(d), 110 Stat. 3826-3828.

or reasonably should have known that an erroneous payment occurred and failed to bring the matter to the attention of the responsible officials. See 4 C.F.R. § 91.5(b).

The OPM report identified 13 employees who received recruitment bonuses that OPM determined to be defective on the basis of substantive or procedural deficiencies. The bonuses were paid from September 1992 to May 1995. The record contains no indication that the recipients knew or had reason to know of these deficiencies. In fact, it appears that Ex-Im Bank's practices in awarding recruitment bonuses had not come under scrutiny at the time the bonuses were paid.⁵ Therefore, we conclude that waiver is appropriate in the case of the erroneous recruitment bonuses.

We also conclude that waiver of erroneous retention allowance payments is appropriate. The retention allowances were awarded to a large number of Ex-Im Bank employees primarily during the Bank's performance appraisal cycles for 1993 through 1995. The 1993 and 1994 awards were made before any question had been raised concerning the Ex-Im Bank's retention allowance program. The 1995 awards occurred during the preliminary stages of the GAO review and before the OPM review was initiated. Payments under previously awarded allowances continued until all such payments were suspended effective January 20, 1996, the day after receipt of the final OPM report.

This case is similar to the situation in Panama Canal Commission, B-205126, June 17, 1982, where we granted waiver of erroneous payments that resulted when the Panama Canal Commission misinterpreted a statute and permitted payment for overtime in excess of a statutory limitation. At the time the payments were made, the Commission employees legitimately believed that the payments were proper. While the Commission recognized that issues existed concerning its legal interpretation, it continued to make the payments until their legality was resolved by a decision of our Office. See also International Trade Commission, B-203478, Dec. 30, 1981.

The Ex-Im Bank's report to our Office indicates that the vast majority of employees receiving retention allowance payments were only generally aware of the ongoing reviews concerning the Bank's retention allowance practices, and had no reason to believe that the payments were erroneous. Indeed, Ex-Im Bank management explicitly advised all employees in August 1996 of its conviction that the retention payments were legal. Even from the perspective of the Ex-Im Bank management personnel who were dealing directly with the GAO and OPM reviews, the retention allowance payments were not necessarily erroneous at the time they were suspended in response to OPM's final report. The OPM report did not determine

⁵The GAO review addressed only retention allowances, not recruitment bonuses.

the legality of any individual retention allowance.⁵ In fact, OPM permitted all such payments to continue for a limited period pending consideration of whether they could be justified.

Finally, we note that four Ex-Im Bank employees received retention allowance payments after their applications for voluntary separation incentive payments ("buyouts") were approved by the Bank. Three of these employees were not awarded retention allowances until after their retirement dates had been set. The question of whether these four employees should be granted waiver needs to be addressed separately because of the apparent inconsistency in receiving both a retention allowance and a voluntary separation incentive payment.

While the Ex-Im Bank acknowledges that the payment of retention allowances to employees whose separation date was scheduled and whose application for a separation incentive had been approved was inappropriate, the Bank maintains that waiver should be granted because the individuals had no more basis than other Ex-Im Bank employees to know that their retention allowances were erroneous.⁷ Specifically, the Ex-Im Bank states that the employees did not recognize the contradiction in receiving both retention allowance payments and separation incentive payments because they were not familiar with the criteria for the award of retention allowances, and it was understood by Ex-Im Bank employees that the retention allowance payments were awarded by management in recognition of superior job performance.

We agree that waiver should be granted for these four employees. As discussed previously, the Bank used retention allowances essentially as pay-for-performance awards. Thus, while the Form 50 Notifications of Personnel Action provided to these employees indicated that they were receiving a retention allowance, the word "congratulations" was written on the Form 50 for three of the employees. The Form 50 for the fourth employee stated that the retention allowance reflected a "raise" of

⁶The report's cover letter stated that OPM had identified what it considered to be "illegal" payments. However, the body of the report described the legal deficiencies in terms of the Ex-Im Bank's general methods of awarding retention allowances and the lack of adequate justification statements and documentation to support awards on the current record.

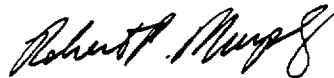
⁷Three of the employees received retroactive retention allowances. As a general rule, a pay increase may not be made retroactively. Marianna Mehmetcs, B-261592, Nov. 13, 1995; Thomas L. Wild, B-240781, Feb. 5, 1991; Edward M. Wirth, B-228711, Dec. 8, 1988. However, the amounts paid retroactively likewise are appropriate for waiver in the absence of any indication that the employees knew or should have known of this defect.

ENCLOSURE II

ENCLOSURE II

5 percent. Thus, the employees had reason to believe that they were receiving payments in recognition of superior job performance, rather than as an incentive to remain at the Bank.

Accordingly, having determined that the employees that received the erroneous payments of retention allowances and recruitment bonuses were not at fault and that collection would be against equity and good conscience, we hereby waive all of the overpayments the Ex-Im Bank made to the employees listed in the Bank's report. See Alan D. Zempel, B-260843, Oct. 24, 1996; Reuben O. Bowman, et al., B-208811, Aug. 2, 1983.



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